BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

KEEP KEIZER LIVABLE and KEVIN HOHNBAUM, Petitioners, v. CITY OF KEIZER, Respondent, E-VILLAGE, LLC, Intervenor-Respondent	LUBA No. 2011-041

JOINT BRIEF OF INTERVENOR-RESPONDENT E-VILLAGE, LLC AND RESPONDENT CITY OF KEIZER

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Joint Brief of Intervenor-Respondent, E-Village, LLC's and Respondent City of Keizer
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I. STANDING OF INTERVENOR-RESPONDENT E-VILLAGE, LLC (HEREINAFTER "INTERVENOR")

Intervenor and Petitioners appeared during the local proceedings below and have standing to appear at LUBA under ORS 197.830(2).

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION SOUGHT TO BE REVIEWED AND REQUESTED RELIEF SOUGHT.

The challenged decision is the approval of a mixed use development consisting of retail, office, multi-family residential, medical building uses, and a Larger Format Store. Specifically, the "Order In the Matter of the Application of E-Village, LLC for Approval of the Keizer Station Master Plan/Subdivision (Area-C Keizer Station)(Master Plan Case No. 2010-16/Subdivision Case No. 2010-18)" (hereinafter "Decision").

Intervenor seeks the Board to affirm the Decision of the City of Keizer.

B. SUMMARY OF ARGUMENTS

1. Response Applicable to Both Assignments of Error

Petitioner seeks reversal of the Decision based on the argument that the City of Keizer has construed certain ambiguous provision of the Keizer Development Code (hereinafter "KDC") in a way that is not "plausible." Both assignments of error assert that the City erred by interpreting local codes, and because those interpretations deal with ambiguous code provisions, the Board must give deference to both plausible interpretations of the KDC.

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2. Response Specific to First Assignment of Error

The City of Keizer (hereinafter "Keizer") has interpreted KDC 2.107.07(D)(3), a code provision that is ambiguous on its face, and Keizer's proffered interpretation *more effectively harmonizes the ambiguous statutory language than Petitioner's own proffered construction with respect to the concerns about statutory construction, context, and creating text alterations, raised in Petitioner's brief,* and as such is unequivocally plausible. In any event, the legal precedent is clear in competing interpretation cases ambiguity is presumed, and ORS 197.829 deference must be given to the Local Government's plausible interpretation, and thus the Board must affirm the order based upon Keizer's plausible interpretation of KDC 2.107.07(D)(3).

Additionally, Petitioners specific concerns with respect to replacing a perceived "completion requirement" with financial assurances are misplaced because the additional conditions such as financial assurances do not violate the code provisions, *as interpreted*. Under Keizer's interpretation of the code, once both components of the development have concurrently *begun construction*, they are deemed to have been constructed concurrently and satisfy KDC 2.107.05(D)(3), regardless of the length of time to finish the construction, and regardless of which component finishes first. Petitioner's legal gesticulations wildly drawing on concerns about empty lots and unfinished projects fail to make Keizer's interpretation implausible, because those concerns ignore the realities and context of the concurrent development of land; but also because those concerns are advanced in support of a "completion requirement" that would effectively write the "concurrently with" language out of KDC 2.107.07(D)(3).

3. Response Specific to Second Assignment of Error

Keizer's interpretation that it has the discretion to not require strict adherence to the "standards" in the ITE Trip Generation Manual as described in KDC 2.301.04(B) in this particular case is a plausible interpretation of a collection of ambiguous code sections. In short, Keizer is expressly granted such discretion by KDC 2.301.04(D).

C. SUMMARY OF MATERIAL FACTS

Petitioner's summary of the material facts is incomplete. Intervenor-respondent offers the following supplemental facts. The Decision is an approval of a master plan for Keizer Station, Area C. Area C is a designated mixed use site, triggering the requirements of KDC 2.107 for mixed use development. Here mixed use under the code involves a development plan which must contain as components a certain amount of required non-retail/non single family development (hereinafter "Required Development") related to the size of a Large Format store in terms of square footage. KDC 2.107 provides criteria for what amounts, and when the Required Development must be developed in Area C compared to the Large Format Store.

Keizer reviewed the preliminary plan for Area C and required a revised Traffic Impact Analysis, and a revision of the plan to reduce two five story buildings in the original plan to a single three story building. On February 22, 2011, the Applicant resubmitted a final plan for approval. The revised plan included transition space between the proposed Large Format Store and the surrounding development. The Applicant voluntarily submitted a plan which balances concerns about compatibility, aesthetics, and impact on the

surrounding areas by working with staff's concerns. The plan provided for a buffer which included a green-space, a number of trees and a six foot buffer wall between any adjoining land and the development.[1]

Afterwards, Keizer's traffic engineer, and the Oregon Department of Transportation weighed in on the revised TIA, approving the analysis and the recommended conditions of approval placed on Applicant pursuant to that analysis. Keizer also carefully, and thoroughly, held hearings and took testimony from interested parties as to proffered ways to interpret KDC 2.107.05(D)(3).

After initially interpreting KDC 2.107.05(D)(3), Keizer reevaluated that interpretation, and acknowledging that there were several competing interpretations to choose from,[2] interpreted KDC 2.107.05(D)(3) to require simultaneous commencement of the required mixed use concurrent with the commencement of the Large Format Store. Keizer further adopted additional assurances to insure completion of the required mix use, notwithstanding that it expressly interpreted the statutory language as not requiring completion of the required mixed use construction, at least as currently drafted.

D. LUBA'S JURISDICTION

Intervenor accepts the jurisdiction of the Board.

[1] Petitioners have categorized the location and use of the required mixed use as a "buffer" to the development as a "significant" issue to Keizer's approval of the master plan. Intervenors take umbrage with this characterization of the facts as unsupported by the record.

[2] One interpretation advanced by staff, but never adopted, was to require construction within four years of the issuance of a building permit to the Large Format Store.

E. SCOPE OF REVIEW

The challenged decision is a quasi judicial land use decision of the City of Keizer subject to review for compliance with law and an adequate factual basis. In this case, the Petitioners challenge the land use decision based on two alleged violations of the local development code. A local government's plausible interpretation of its own development code is entitled to ORS 197.829 deference, as argued in more detail below.

F. MOTION TO STRIKE

LUBA's authority is limited to matters that are in the local record. ORS 197.835(2)(b). Factual assertions not in the record may not be considered or made a part of the LUBA record.

Thus, Intervenor-Respondent E-Village LLC moves to strike the final sentence in the first complete paragraph of page 6 of the Petition. That statement claims there was no discussion or interpretation of KDC 2.107.05(D)(3) at the April 4, 2011 council meeting. The cited portion of the record begins with the council members acknowledging an issue where different interests had advanced competing interpretations of an ambiguous statute. The record reflects a nuanced discussion about the contextual concerns of the chosen interpretation. Since that statement is contradicted in the cited portion of the record, then nothing cited supports the statement that Keizer failed to discuss or interpret KDC 2.107.05(D)(3) at the stated meeting.

Similarly, Intervenor-Respondent moves to strike the first sentence of the final paragraph of 7 of the Petition, stating that subsections 3 and 4 of Condition 57 are Councilor McKane's interpretation. No portion of the record cited supports the statement that only subsections 3 and 4 of condition 57 represent any singular city councilor's interpretation, or that any singular councilor has the power to singly interpret the KDC.

III. RESPONSES TO ASSIGNMENTS OF ERROR

Response to First and Second Assignment of Error

The Oregon Supreme Court in Siporen v. City of Medford, unequivocally holds that "when a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed as held in Clark (Emphasis Supplied) and as provided in ORS 197.829 of an ambiguous local ordinance, statute, or code." 349 Or 247, 259, 243 P.3d 776 (2010).

Of particular value in explaining the underpinnings of this holding is the language provided by the Court of Appeals handling of Siporen, and quoted with approval by the Supreme Court:

> What the [C]ourt [of Appeals] did suggest is that, when both parties' interpretations necessarily are based on context, i.e., the surrounding provisions, and the surrounding provisions are such that neither party's interpretation fully harmonizes them, then the fact that the opposing party can indentify some part of the surrounding provisions with which the local government's interpretation does not easily fit does not mean that LUBA is excused from accepting the local government's interpretation in accordance with ORS 197.829(1).

Id. at 256 citing Siporen v. City of Medford, 231 Or.App. at 602, 220 P.3d 427.

Petitioner ably attempts to drag the facts of this case away from the obvious, that this case is squarely addressed by the above precedent. Petitioner asserts both the strengths of its own interpretation, and the Petitioners asserted weaknesses regarding Keizer's interpretation all in an effort to invite LUBA to do exactly what the above authority has expressly, and painstakingly, instructed LUBA *not* to do, which is to latch on to a competing interpretation as a primary means of determining plausibility. That approach, though gamely disguised by Petitioner, must be disregarded, and rejected in its entirety, as neither relevant in this particular case, nor dispositive to the issue of whether Keizer's proffered interpretations are plausible.

The only means Siporen provides for proving implausibility in this circumstance is where it can be shown that the local government's interpretation is inconsistent with all of the "express language" that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations. Id. at 259.

Neither of the challenged interpretations in this instance, either of KDC 2.107.05(D)(3), or of KDC 2.301.04, are inconsistent with all of the express language of the applicable code sections, and accordingly cannot be construed as implausible by the Board. Neither of the challenged interpretations are inconsistent with the purposes or policies underpinning the regulations, and so also cannot be construed as implausible by the Board, as argued more fully below.

Response to First Assignment of Error

A. KDC 2.107.05(D)(3) is Ambiguous

In this case, Petitioners fail to demonstrate the requisite implausibility identified by Siporen by arguing that KDC 2.107.05(D)(3) requires simultaneous completion, and in doing so the Petitioner's proffered interpretation of this code section re-writes the code to omit the terms "or concurrent with."

To explain, the full text of the code provision in question is set forth below:

> The development required in Subsections D(1) and D(2) above shall take place in the same Master Plan area. The approved Master Plan shall be conditioned to require such development to be constructed before *or concurrently with* the Larger Format Store. (Emphasis Supplied).

KDC 2.107.05(D)(3).

Petitioner argues that this code provision *unambiguously* requires at a minimum that the mixed use development addressed in the master plan be completed before the Large Format Store would be issued an occupancy permit. However, that standard is already contained within the term "constructed before," giving Keizer the option to condition approval on the completion of construction of required development, by providing that "The approved Master Plan shall be conditioned to be constructed before … the Larger Format Store." However, the code does not limit Keizer's ability to approve the Master Plan in only that manner. The code also clearly provides something else, namely that "the approved Master Plan shall be conditioned to be constructed concurrently with the Larger Format

Store."[3] To accept Petitioner's construction of the code provision eliminates entirely the second option of approval, as Petitioners' interpreted requirement is already contained in the language "constructed before."

Additionally, as will be more fully explained below, the Petitioners have gone further and assumed their construction is the only conceivable interpretation of this code provision in arguing that Siporen should not be applied, notwithstanding the clear ambiguity present within KDC 2.107.05(D)(3), as demonstrated above.

B. Keizer did not change or amend the development code by interpreting KDC 2.107.05(D)(3) either by adding words and concepts, or by effectuating a text amendment; but rather, that characterization of Keizer's activity impermissibly assumes Petitioner's preferred construction of "constructed concurrently" as including an unambiguous requirement of prior completion of mixed use development.

Petitioners argue that the challenged interpretation of KDC 2.197.05(D)(3) adds words and concepts to the code section in question, a forbidden practice under the logic of Western Land and Cattle v. Umatilla County, which holds in pertinent part that a local government's interpretation must be consistent with the canons of statutory construction contained in ORS 174.010 *et seq.* 230 Or.App. 202, 210, 214 P.3d 68 (2009).

However, under Petitioner's proffered construction, the words "or concurrently with" would be written out of KDC 1.197.05(D)(3), as explained above.

[3] This is the construction Keizer gave to the code provision, acknowledging two prongs of conceivable conditions of constructing required mixed use. Keizer entertained a number of different advanced interpretations of this code section, and selected the one it felt best harmonized the code language. (R 525, 100-102).

In Petitioner's proffered attempts to argue that Keizer added words and concepts, or effectuated a text amendment by interpreting what it means to be constructed "concurrently with," the absolute meaning of this very term is assumed by Petitioners to be their preferred meaning. Accordingly, since Petitioners assume that the term requires completion before the Large Format Store can be given an occupancy permit, then Petitioners are free to characterize anything other than their assumed prior completion requirement (not expressly supported in any relevant KDC section, and minimally inferentially supported) as a "text amendment" or adding words and concepts. But, as argued above, there can be no argument that the code provision in this instance was unambiguous, and the City Council announced it as ambiguous at public hearings.

Again, Petitioners' argument is directly addressed by Siporen: the assumption of one plausible construction does not preclude other constructions as plausible interpretations, and Petitioners in this case cannot defensibly assert the statute is unambiguous. Supra. "Constructed concurrently with" is ambiguous as a matter of statutory language, but it is further ambiguous because of the context of the risks, financing, and other factors of land development and coordinated construction projects. Each is unique with its own set of challenges and obstacles. To assume that the path of construction and to completion for any two projects are exactly the same length, especially projects in a mixed use zone, which are diverse in design purpose, and scale; is removed from reality.

To harmonize the issue of what it means to construct something "concurrently with" another project, given the realities of different project lengths, inherently means that one of the projects will be under active construction when the other project either has not started, or

has not finished. Thus, Keizer found through substantial evidence that "constructed concurrently" can mean that one project is under construction when the other starts or it can mean that both projects start at the same time. (R 101). In either event, given that no projects are exactly the same length, it is absolutely contemplated in at least one plausible construction of KDC 2.197.05(D)(3) that the Larger Format Store could be completed before the Required Development, with both projects having begun at the same time. (R – 101).

Thus, Keizer plausibly interpreted KDC 2.197.05(D)(3) when it authorized approval of the plan based upon simultaneous beginning of construction on the project, requiring actual construction (foundations and grading) to have occurred "concurrently with" the construction of the Larger Format Store.

The appropriate starting point for the analysis is that Keizer found through substantial evidence that construction occurring simultaneously on both projects at some point in time satisfies the "constructed concurrently with" option of KDC 2.107.05(D)(3) requirement.[4] Thereafter, the Petitioners' arguments are unveiled as an attempt to present an unambiguous statute in order to argue that Keizer's rightful interpretation of the code provision is improper legislation through interpretation, all in order to avoid the proper application of ORS 197.829 deference mandated by Siporen. In this case, those arguments fall short.

For example, the additional "words and concepts" complained of in Petitioners' brief are that Keizer replaced a construction completion requirement with a foundation completion requirement and financial assurances of future completion. The fundamental problem with this argument is that it assumes that the code provision unambiguously requires completion

[4] (R – 539-541, 101)

of the Required Development construction prior to the construction of the Large Format Store. The "prior completion requirement" assumed by Petitioners is simply not present in KDC 2.107.05(D)(3) as plausibly construed by Keizer. **Just because Keizer *could* interpret the provision as Petitioners would like does not support the argument that *if* Keizer had interpreted the code section as Petitioners would have liked, then the interpretation that Keizer did choose adds words and concepts to the KDC.**

Thus, Petitioners' reliance on Western Land is misplaced. In that case, the court held that the local government must follow tenets of statutory construction under ORS 174.010 and .020 in interpreting its local ordinance. 230 Or.App. 202, 214 P.3d 68 (Or. App. 2009). Petitioners proffered interpretation of KDC 2.107.05(D)(3) fails this standard by writing words out of the statute in violation of ORS 174.010.

Regardless, this holding must also be tempered by the framework of Siporen, Supra. The Court of Appeals upheld the County's interpretation with far less supporting code text or context than exists in this case, holding that LUBA correctly gave ORS 197.829 deference to the local government, even where the scant trace of a negative implication in a code section was advanced as creating an ambiguity requiring interpretation. *See* 230 Or.App. at 209. Far more textual and contextual support for Keizer's interpretation exists in this case, and the Board should properly apply ORS 197.829 deference to that interpretation, as it did to the local government interpretations in Western Land.

Petitioners also cite Gould, for the proposition that "Where the local code or state law does not include such language, substituting financial assurances for construction violates the regulation." (*See* Petitioners' Brief at p. 9). However, a careful reading of that case reveals

that the Board did not hold that substituting *any* financial assurances for *any* construction uniformly violates *any* regulation. What the Board properly recognized in that case, which is not of concern in this case, is that where State Law contradicts the express language of a local code, then the local government's interpreting the local code in order to circumvent a contradicting state law provision is error. (*See* Gould v. Deschutes County, __ Or LUBA __, (LUBA No. 2006-100, May 14, 2007) *slip op.* at 22-23). The facts of Gould are so specific to the statutory framework in that instance that it provides no precedential value to the Board's analysis in this case, and should thus be disregarded from the Board's analysis.

For the same reasons, Petitioners' attempts to categorize Keizer's rightful and plausible interpretation of the code sections at question as a "text amendment" falls short. Petitioners cite Scovel and Foland again in an attempt to categorize this interpretation as a text amendment, expressly forbidden by that authority. However, a careful reading of both the cited cases, and Petitioners' attempts to analogize those situations to this case, reveal that Petitioners' reliance on that authority is misplaced as well.

In Scovel, the Board correctly highlighted that the local government's interpretation of a code provision which effectively added additional time extensions that appeared nowhere in the applicable code *and where in fact the applicant was limited to one extension by the express language of the code*, was a legislative amendment authored by the local government through the guise of code interpretation. Scovel v. City of Astoria, ___ Or LUBA ___ , (LUBA No. 2009-116, January 28, 2010) *Slip Op.* at 5-6. However, in this case, the attempted "amendment" complained of by Petitioners is again based on the fundamental premise that KDC 2.107.05(D)(3) unambiguously requires completion of the

Required Development before the completion of the Larger Format Store. As more fully explained above, it simply does not. Thus, Keizer is faced with creating a workable framework out of an ambiguous code section that authorizes approval of a master plan with Required Development "constructed … concurrently with" the Larger Format Store. Further, this code section must recognize and deal with the reality that no two construction projects (especially those of diverse design and intended use) will be the same length. Accordingly, Keizer has given effect to the "concurrently with" language in KDC 2.107.05(D)(3) in a way which does not add any concepts to the code provision, and unlike Petitioners' proffered interpretation, Keizer's interpretation does not *remove* any words from the applicable code section either.

For the same reasons, Petitioners reliance on Foland is misplaced. The court in that case specifically found an absence of *any* code provisions that supported the local government's interpretation, when reasonably construed. Foland v. Jackson County, 215 Or App 157 (2000). In this case, the "concurrent with" language, as fully explained above, provides exactly the support for Keizer's interpretation in this case, as to adopt Petitioner's proffered interpretation would remove those very words from the statute.

Construction projects of varying types will have times have various pathways of construction including the time required to complete the project. Thus, it is a reasonable interpretation of the "concurrent with" language in KDC 2.107.5(D)(3) to require simultaneous beginning of those projects of varying length, particularly when analyzed within the context of the financial harm that construction projects suffer when delays outside of the contractors' control stretch out completion of the project. (R 520, 539-540). The

reality is that financiers who back construction projects cannot meaningfully attain a return on their investment (and in many cases return of the principal of the loan) without those projects timely finishing and turning the once empty or inefficiently used property into income producing properties. (R 539-540).

That is exactly why after closely examining its original interpretation of the requirement, Keizer selected its final form of interpretation as announced in Condition 57 because flaws inherent in the Petitioners' proffered interpretation do not take into account the realities of financing large development. (R 539-544).

However, Petitioners would have the Board believe that Keizer's decision to choose between competing interpretations is analogous to amending the code provision, despite the fact that such an argument requires as a premise that there is no textual support for Keizer's interpretation of KDC 2.107.05(D)(3). In this case, the language clearly contemplates and supports Keizer's interpretation.

Petitioner also argues that Keizer's interpretation of KDC 2.107.05(D)(3) is at odds with the plain meaning of the words in the code section. Fundamentally, Petitioners arguments are tied to the usage of the past tense of "constructed" in the code provision. Petitioners argue in essence that because "construct[ed]" is in the past tense, then the rule requires prior completion of the required mixed use prior to the completion of the Larger Format Store. Petitioners ignore that the verb construct[ed] is within the context of the phrase "constructed prior to" that the modifying language of "or concurrent with" does not and cannot affect the tense of the verb constructed. Keizer specifically considered this

argument and rejected the use of "constructed" as set forth above. (R 539-540, 520, 100-102).

This argument is form over substance when reading the provision as a whole. As argued fully above, once the provision is read as a whole, it is apparent that Keizer must be granted deference to interpret its code allowing concurrent construction because "the fact that the opposing party can indentify some part of the surrounding provisions with which the local government's interpretation does not easily fit does not mean that the LUBA is excused from accepting the local government's interpretation in accordance with ORS 197.829(1)" Siporen, Supra.

C. Keizer's use of additional guarantees of project completion, and securing financing for required mixed use development as part of satisfying KDC 2.107.05(D)(3) are additional protections that Keizer may include, but are not required to be included to satisfy the concurrency requirement, as plausibly interpreted.

Petitioners construe the inclusion of added protections announced in Condition 57 as manipulations of the code provisions, by changing "completed construction" to "financial guarantees of performance," and further arguing that since the City Manager determines what sufficient guarantees of performance will satisfy the condition, then the public would not have their opportunity to have Notice and Comment regarding compliance with the condition.

However, as interpreted, there is no completion guaranty in KDC 2.107.05(D)(3). (R – 102). The simultaneous construction of foundations, and applying for building permits already satisfy KDC 2.107.05(D)(3), as interpreted. That Keizer took further steps to guaranty completion is not a violation of the code or of the principles announced in the

authority cited by Petitioners, because the follow up provisions in Condition 57 do not defer a determination concerning any substantive characteristic of the development without an opportunity for public comment.

To explain, in Rhyne v. City of Portland, cited by Petitioners, the court held that many situations may defer review of compliance to second stage without notice and comment, without violating statutory notice and public hearing requirements. LUBA No. 92-08 (Or. LUBA July 10, 1992) *Slip op.* at 7 To quote at length:

> Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. *In such circumstances, neither notice to adjoining property owners nor additional public hearings are statutorily required during the second stage*. (Emphasis Supplied). (Internal Citations Omitted).

Id. at 7-8 citing Meyers v. City of Portland, 67 Or.App. 274, 280 n. 3, 678 P.2d 741; Bartles v. City of Portland, 20 Or LUBA 303, 310 (1990). The court went on to more fully explain:

> Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage.

Id. at 8-9.

Also of importance in determining whether sufficient opportunity for notice and public hearing was provided, is illustrated in Gould v. Deschutes County, which further explains the Meyer framework:

> If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval.

216 Or.App. 150, 171 P.3d 1017 (Or.App. 2007).

A finding that compliance with an approval criteria can be shown both expressly on the record, or implicitly. *See* Paterson v. City of Bend, 201 Or.App. 344, 349, 118 P.3d 842 (Or.App. 2005).

In this instance the factual record is clear that Keizer is proceeding under the first prong available to it under the framework announced in Rhyne, and that the nature of the development is certain and not subject to future study and determination. There are no methods in Condition 57 for substituting a different required mixed use, or otherwise changing the master plan submitted for approval, or in other words, Condition 57 does find feasible compliance with KDC 2.107.05 in the first stage. (*See* R – 100-103). Thus, the later delegation to the City Manager of reviewing the financial assurances contemplated in Condition 57 does not add anything substantive to the compliance with KDC 2.107.05, as interpreted, because the City Manager will not make any changes to the criteria for determining compliance at that second stage of oversight or otherwise change the master plan. The only role the City Manager will play in this instance is to ensure that the previously announced criteria, for which notice and comment were offered, (and which in

fact led to this appeal), are followed, as expressly allowed in Meyer, because nothing in Condition 57 "could be used to deny interested parties the full opportunity to be heard" because no "matters on which the public has a right to be heard" are decided by the City Manager under Condition 57. (*See* 67 Or.App. at 280).

Once again, Petitioners have begun the starting point of their analysis with the premise that KDC 2.107.05(D)(3), regardless of interpretation, requires completion of the required mixed use facility prior to the issuance of an occupancy permit for the Larger Format Store. Keizer has interpreted KDC 2.107.05(D)(3) to not require completion of the required mixed use facility. (R 102). Nothing in that code section or the surrounding code sections requires otherwise. Keizer has harmonized the provisions to include submission of financial guarantees to the City Manager, but the City Manager has no discretion under the interpretation at issue to change any part of the approved master plan, and thus the concerns about depriving the public its statutorily guaranteed right to notice and a hearing that drove the decisions in Gould, Rhyne, and Oregon Coast Alliance are not present in this instance.

For all of the reasons stated above, Keizer has not violated the provisions of the KDC through its interpretation of KDC 2.107.05(3).

Response to Second Assignment of Error

Petitioners next challenge Keizer's decision by highlighting Keizer's failure to follow the ITE Trip Generation Manual in its Traffic Impact Analysis (hereinafter "TIA") as described in KDC 2.301.04(B). However, and in applying the Siporen framework set forth above, Keizer's decision to allow interpolation in this particular instance is allowed by

Keizer, given their interpretation of the code which requires Keizer to harmonize KDC 2.301.04(B) with KDC 2.301.04(D),(E), and (F).

Petitioners have argued that because a code provision provides for the use of the ITE Trip Generation Manual in determining Typical Average Daily Trips that Keizer's decision to allow a modification to the manual's recommendations regarding the use of statistical interpolation violates the KDC.

Siporen requires deference to plausible interpretations of the code unless Petitioners can demonstrate that the interpretation is inconsistent with all of the express language of the code. Supra.

In this case, a code section entitled "Traffic Impact Analysis Requirements," is in direct conflict with subsection (B), and gives Keizer final discretion on the parameters of the Traffic Impact Analysis, providing in pertinent part:

> Pre-application Conference. The applicant will meet with Keizer Public Works prior to submitting an application that requires a Traffic Impact Analysis. *The City has the discretion to determine the required elements of the TIA and the level of analysis expected*. (Emphasis Supplied).

KDC 2.301.04(D)(3).

Furthermore, any denial or conditional approval of a plan pursuant to a TIA is also subject to Keizer's discretion under the express provisions of the code. The KDC provides under "Conditions of Approval" that "The City may deny, approve, or approve a development proposal with appropriate conditions." KDC 2.301.04(F). Thus, whether or not the traffic report showed a burden to the intersection or not, Keizer is free to approve the

development without conditions, as long as the TIA meets the approval criteria under the code.

That provision, entitled "Approval Criteria" includes the following list of criteria:

a. The Traffic Impact Analysis was prepared by a professional engineer; and
b. If the proposed development shall cause one or more of the effects in Section 2.301.04C, above, or other traffic hazard or negative impact to transportation facility, the Traffic Impact Analysis shall include mitigation measures that meet the City's Level of Service and Volume/Capacity standards and are satisfactory to the City Engineer, and ODOT when applicable; and
c. The proposed site design and traffic and circulation design and facilities, for all transportation modes, including any mitigation measures, are designed to:
    1) Have the least negative impact on all applicable transportation facilities; and
    2) Accommodate and encourage non-motor vehicular modes of transportation to the extent practicable; and
    3) Make the most efficient use of land and public facilities as practicable; and
    4) Provide the most direct, safe and convenient routes practicable between on-site destination, and between on-site and off-site destinations; and
    5) Otherwise comply with applicable requirements of the City of Keizer Development Code

KDC 2.301.04 (E)

Given the inclusion of the above code sections, and reading both sections together, it is clear under Siporen that the Board must defer to Keizer's interpretation that it has the discretion to modify the requirements of the TIA. The discretion granted in subsection (D) of the code grants expressly authorizes Keizer's decision, and clearly the decision is supported by an interpretation of the code that must be given ORS 197.829 deference, because it is not inconsistent with KDC 2.301.04(D). Further supporting this argument is

that none of the stated Approval Criteria in subsection (E) reference the Typical Average Daily Trips as a precursor to approval. Thus, applying the proffered construction of Petitioners would write subsection (B) into subsection (E) of KDC 2.301.04. Accordingly, Keizer has created a plausible interpretation of the collection of the code sections to harmonize and attempt to give meaning to all of the terms, and the Board should apply ORS 197.829 deference to Keizer's interpretation.

Similarly, the purpose of the code is to provide protection to Keizer's right of way (see KDC 2.301.04(A)), while allowing for adjustments to the process to not unduly encumber growth, since Keizer is expressly given both the discretion to adjust the requirement of the TIA in subsections (D) and the discretion to approve development with or without conditions in subsection (E). Once again the proffered argument and analysis of Petitioners fails to establish that Siporen is not applicable, and accordingly ORS 197.829 deference is required in this instance.

Secondly, the factual underpinnings of Keizer's treatment of this issue in the proceedings below requires explanation and clarification. Keizer was aware before the Applicant began the process of submitting the master plan in Area C a traffic impact analysis had been performed with Areas A and D of Keizer Station. (*See* R 152-153). There is no local data available, adding extreme costs compared to the advantage of the information received. (R 154). Recognizing this situation, Keizer made a choice well within its discretion under the KDC, as interpreted, to not require as arduous an analysis, and the net effect is that the conditions placed upon development have been approved by ODOT in the record. (R 151).

IV. CONCLUSION

For the reasons stated above, Intervenor-Respondent respectfully requests that the Board defer to Keizer's interpretations of its code, and affirm the decision of Keizer in approving the Master Plan.

Dated this ___ Day of _____, 2011.

/s/ Zachary Dablow
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Attorney for Intervenor-Respondent

/s/ Shannon Johnson
Shannon Johnson, OSB No. 852482
Attorney for Respondent

CERTIFICATE OF FILING

I hereby certify that on July ____, 2011, I filed the original and four copies of this *Joint Brief of Intervenor-Respondent E-Village LLC and Respondent City of Keizer* with the Land Use Board of Appeals, 550 Capitol Street NE, Suite 235, Salem, OR 97301-2552, by personal delivery.

Dated this ____ day of July, 2011.

Zachary Dablow, Attorney Intervenor-Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Joint Brief of Intervenor-Respondent E-Village LLC and Respondent City of Keizer f* for LUBA No. 2011-041 on July ____, 2011, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

To Petitioners:

Kenneth D. Helm
Attorney at Law
16289 NW Mission Oaks Drive
Beaverton, OR 97006

Dated this ____ day of July, 2011.

Zachary Dablow, Attorney for Intervenor-Respondent